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No. 93-379

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOSHUA VANDERVELDEN,
Petitioner,
v.
BENJAMIN VICTORIA, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the Wisconsin Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Petition does not present any questions that are appropriate for review by this Court pursuant to a writ of certiorari.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
REASONS FOR DENYING THE WRIT	6
I. THE WISCONSIN COURT OF APPEALS' DECISION DOES NOT RAISE ANY FEDERAL CONSTITUTIONAL ISSUES BECAUSE IT IS BASED ON LONG-ESTABLISHED PRINCIPLES OF STATE LAW	6
II. BECAUSE THE WISCONSIN COURT OF APPEALS' DECISION RESTS SOLELY ON STATE LAW GROUNDS, THIS COURT LACKS JURISDICTION TO DETERMINE WHETHER THE DECISION IS CORRECT	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases Page

Herb v. Pitcairn, 324 U.S. 117 (1945) 6
Howlett v. Rose, 496 U.S. 356 (1990) 10, 11
McCluskey v. Steinhorst, 173 N.W.2d 148 (Wis. 1970) 9
Michigan v. Long, 463 U.S. 1032 (1983) 11
Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976) 8
Puhl v. Milwaukee Automobile Ins. Co., 99 N.W.2d 163 (Wis. 1959) 3, 4
Ridgway v. Ridgway, 454 U.S. 46 (1981) 6
Roe v. Wade, 410 U.S. 113 (1973) 4, 5, 6, 7
Ward v. Board of County Comm'rs, 253 U.S. 17 (1920) 10, 11

State Constitutional Provisions

Wis. Const., art. I, sec. 9 ..... 3, 4, 7

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STATEMENT OF THE CASE

The facts and procedural history of this case are discussed thoroughly in the Wisconsin Court of Appeals' decision. Petitioner's Appendix ("Pet. App.") at 4a-7a. On January 10, 1979, petitioner Joshua Vandervelden's mother, Linda Noie, then six to eight weeks pregnant with the petitioner, went to the offices of Fox Valley Reproductive Health Care Services to obtain information about an abortion. Two days later, Ms. Noie returned to the clinic and signed the required consent forms for an abortion. Several hours later, the respondent, Dr. Benjamin Victoria, performed an abortion procedure.

Ms. Noie subsequently learned that the abortion procedure had not been successful. On September 18, 1979, after a difficult labor, Ms. Noie gave birth to Joshua.

Joshua suffers from a hearing loss in his left ear, first detected when he was four years old, which he attributes to the unsuccessful abortion. He also claims to have an asymmetry in the lateral ventricles of his brain, which he attributes as well to the abortion procedure.

On February 28, 1989, when he was nine years old, Joshua filed this civil action against Dr. Victoria, alleging that the abortion procedure constituted a battery. Dr. Victoria moved for summary judgment dismissing the claim, asserting among other defenses that Ms. Noie's consent precluded any action based on a battery theory. The trial court rejected that argument, holding that the mother's consent was not sufficient as a matter of law because "[t]he child . . . gave neither consent to batter, nor consent to abort." Pet. App. at 6a.

The case proceeded to a jury trial on January 14, 1991. The trial court instructed the jury that, under Wisconsin law, a battery is the unlawful use of force upon the person of another, that the use of force is unlawful when no permission for the contact has been given "by the person upon whom such force . . . has been committed," and that a "fetus is a person." *Id.* The jury found that Dr. Victoria had committed a battery and awarded the petitioner over $1.1 million in compensatory damages. *Id.* at 6a-7a.

The Wisconsin Court of Appeals reversed. *Vanderveldden v. Victoria,* 177 Wis. 2d 243, 502 N.W.2d 276 (Ct. App. 1993); Pet. App. at 2a-18a. One of the elements of battery under Wisconsin common law, the court said, is the unlawful use of force upon another. Pet. App. at 8a. The court held that the petitioner had not proved the elements of battery "[b]ecause Ms. Noie consented freely and without coercion to the procedure, and because Dr. Victoria did not exceed the scope of that consent. . . ."

Pet. App. at 8a-9a. "[A]s a matter of law," the court concluded, "there can be no finding that Dr. Victoria unlawfully contacted the fetus." *Id.* at 9a.

The Court of Appeals stated that the trial court had "implicitly concluded that a fetus must independently give its consent to a medical procedure to which the mother has already consented." *Id.* In a footnote, the court noted that such a requirement would create a host of "logistical problems." In that footnote, and there alone, the court mentioned in passing the constitutional right to an abortion.

> If we were to uphold the decision of the trial court, we would essentially be creating a "fetal consent requirement." The question then arises as to who could give consent on behalf of the fetus. The appointment of a guardian ad litem is a possibility. However, the problems associated with a guardian appointment are readily apparent. Who would select the guardian? Who would review the selection process? What rights would the guardian be asserting? Would personal beliefs on the abortion issue be considered in the selection process? Clearly, a fetal consent requirement could create extremely cumbersome situations. Further, such a requirement would infringe upon a woman's constitutional right to obtain an abortion.

Id. at 10a n.5.

The Court of Appeals did not base its decision on those considerations, however. "Even ignoring the logistical problems" identified in the footnote, the court held, the petitioner's theory "has no basis in the law." *Id.* at 10a.

The petitioner and the trial court had relied on two sources to support the battery theory: the "remedy for wrongs" provision of the Wisconsin Constitution, art. I, sec. 9, and the decision of the Wisconsin Supreme Court in *Puhl v. Milwaukee Automobile Ins. Co.*, 99 N.W.2d

163 (Wis. 1959). The Court of Appeals found "neither source persuasive in the present context." Pet. App. at 11a.

Article I, sec. 9, of the Wisconsin Constitution states that "[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character. . . ." The Court of Appeals questioned whether a nonviable fetus is a "person" within the meaning of that provision, noting that this Court had addressed a similar issue in *Roe v. Wade*:

> As an initial matter, we note the fact that the trial court referred to the nonviable fetus as a "person." We know of no court that has found a fetus of less than three months' gestational age to be considered as a person entitled to legal protection. This finding runs counter to the United States Supreme Court's ruling in *Roe v. Wade*, 410 U.S. 113, 158 (1973) ("All this . . . persuades us that the word 'person', as used in the Fourteenth Amendment, does not include the unborn").

App. at 11a-12a.

But whether or not a fetus is a "person" under art. I, sec. 9, the court said, that provision still provides no basis for the petitioner's claim. Previous Wisconsin Supreme Court decisions held that this constitutional provision does not create any legal rights, but simply guarantees access to the courts to enforce existing rights. *Id.* at 12a. To allow petitioner's battery action, the Court of Appeals concluded, "would be to create a right not in existence in Wisconsin law." *Id.*

Turning next to the asserted common law basis for the petitioner's battery claim, the Court of Appeals found that the Wisconsin Supreme Court's decision in *Puhl v. Milwaukee Automobile Ins. Co., supra,* provided no support for that theory. *Puhl* presented the issue of whether a plaintiff could assert a negligence claim for injuries suffered in an automobile accident while she was a non-

viable fetus. The Court of Appeals found *Puhl* to be "of no help" in this case because the *Puhl* court "never considered the question of a fetus' lack of consent to a medical procedure." *Id.*

The Court of Appeals concluded that under Wisconsin law, "where a woman has freely consented to an abortion procedure on a nonviable fetus, a physician may not be held liable for battery to the unborn fetus." *Id.* at 12a. The court did not rule out the possibility of recovery for prenatal injuries, but held that "[n]egligence law, not battery law, provides the appropriate basis for determining physician liability where the plaintiff alleges that the physician improperly performed a medical procedure." *Id.* at 13a.

The petitioner filed a petition with the Wisconsin Supreme Court seeking discretionary review of the Court of Appeals' decision. The Supreme Court denied that petition on June 16, 1993.

SUMMARY OF ARGUMENT

The petitioner asked the courts of Wisconsin to adopt a theory of tort liability that simply made no sense. He contended that a child who allegedly was injured by an unsuccessful abortion procedure performed with his mother's consent can sue the physician for battery. The Wisconsin Court of Appeals rejected that claim, holding that it "has no basis in the law" of Wisconsin. Pet. App. at 10a.

The petitioner erroneously argues to this Court that the Wisconsin Court of Appeals' decision was "[b]ased primarily on *Roe v. Wade*. . . ." Petition for Writ of Certiorari ("Pet.") at 12. To the contrary, the Court of Appeals' decision applied established principles of Wisconsin law to reject the petitioner's novel theory. The Court of Appeals mentioned *Roe v. Wade* but once, by way of analogy, when it rejected the proposition that a

fetus is a "person" protected by the Wisconsin Constitution.

Notwithstanding the petitioner's repeated assertions to the contrary, the Wisconsin Court of Appeals decided an issue of state tort law by applying established state common law principles and interpreting state constitutional provisions. Regardless of whether the Court of Appeals decided that issue correctly or incorrectly, this Court does not have jurisdiction to review that decision.

REASONS FOR DENYING THE WRIT

I. THE WISCONSIN COURT OF APPEALS' DECISION DOES NOT RAISE ANY FEDERAL CONSTITUTIONAL ISSUES BECAUSE IT IS BASED ON LONG-ESTABLISHED PRINCIPLES OF STATE LAW.

It is a fundamental principle of federal jurisprudence that the United States Supreme Court lacks jurisdiction to review matters of state law. This Court's "only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights." *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981), quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). The Wisconsin Court of Appeals' decision did not adjudge federal rights when it rejected the petitioner's state tort law claim. Accordingly, this Court lacks jurisdiction to review that decision.

The petitioner is able to create federal questions in the Court of Appeals' opinion only through a persistent misreading of that decision. The petitioner states that "[b]ased primarily on *Roe v. Wade*, the Wisconsin Court of Appeals gave effect to an argument of the respondent doctor . . . to the effect that petitioner had no pre-natal rights, inchoate or otherwise against said doctor for the injuries he suffered. . . ." Pet. at 12. He is wrong in both respects. The Court of Appeals did not base its decision on *Roe v. Wade* or any other federal grounds,

but on the common law of Wisconsin. Under that common law, moreover, the court found that the petitioner had a remedy for prenatal injuries, but held that his remedy resides in negligence law, not battery.

Roe v. Wade and the constitutional right to an abortion received only a passing mention in the Court of Appeals' decision. The court referred to *Roe* just once in the decision, during its discussion of whether a fetus is a "person" within the meaning of the Wisconsin Constitution's "remedy for wrongs" provision. The court supported its observation that "no court . . . has found a fetus of less than three months gestational age to be a person entitled to legal protection" with a citation to *Roe*. Pet. App. at 11a. Contrary to the petitioner's implication, *Roe* did not "compel" the Court of Appeals to interpret the word "person" in the state constitution to exclude nonviable fetuses. At most, the state court found this Court's construction of the Fourteenth Amendment to provide a useful analogy for interpreting the Wisconsin Constitution.

The Court of Appeals rejected the petitioner's assertion that art. I, sec. 9, of the Wisconsin Constitution provided a basis for his claim, but its decision did not depend on whether a fetus is a "person" under that provision. Applying well-established Wisconsin precedent, the Court of Appeals held that the "remedy for wrongs" provision guarantees access to the court to enforce existing rights but does not create new rights. Pet. App. at 12a. The petitioner's claim, if recognized, would establish a new right. *Id.*

A woman's constitutional right to an abortion is mentioned only once in the Court of Appeals' decision, in a footnote. *Id.* at 10a n.5. That brief mention of the issue, which appears almost as an afterthought, was not the basis of the court's decision, but was merely an example of one of the many problems the court avoided when it

rejected the petitioner's battery theory on state law grounds. "Even ignoring the logistical problems that such a 'fetal consent requirement' creates," the Court said, the petitioner's theory "has no basis in the law." *Id.* at 10a. The court's reasoning was succinct and compelling:

> In the present case, Joshua has failed to satisfy the first element of a battery—that of unlawful contact by Dr. Victoria. Neither party disputes the fact that Ms. Noie gave her consent for the medical procedure performed by Dr. Victoria. Both parties also agree that the abortion procedure in the present case, although unsuccessful, was a legal procedure. Further, Dr. Victoria, at the time of the procedure, was a fully licensed physician in Wisconsin. Because Ms. Noie consented freely and without coercion to the procedure, and because Dr. Victoria did not exceed the scope of that consent, as a matter of law there can be no finding that Dr. Victoria unlawfully contacted the fetus. Thus, the intentional tort of battery is not an appropriate basis upon which to consider the actions of Dr. Victoria.

Id. at 8a-9a (footnote omitted).

Requiring a physician to obtain fetal consent before performing an abortion undoubtedly would violate a woman's constitutional right to obtain an abortion without the consent of a third party.[1] As an alternative to his state law defenses, Dr. Victoria also asserted that constitutional defense in the Wisconsin courts. What the petitioner fails to recognize, however, is that the constitutional defense was not the basis for the Wisconsin Court of Appeals' decision. There is not the slightest hint in that decision that the constitutional defense affected the Wisconsin court's resolution of this case.

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[1] *See, e.g., Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 69 (1976) (spousal consent requirement unconstitutional).

The Wisconsin Court of Appeals rejected the petitioner's theory on Wisconsin state law grounds and on those grounds alone. Accordingly, there is no federal constitutional issue here for this Court to review.

II. BECAUSE THE WISCONSIN COURT OF APPEALS' DECISION RESTS SOLELY ON STATE LAW GROUNDS, THIS COURT LACKS JURISDICTION TO DETERMINE WHETHER THE DECISION IS CORRECT.

Although the petitioner eventually acknowledges that the Wisconsin Court of Appeals' decision "purports" to be based on state law, Pet. at 22, he argues that this Court should review that decision to determine whether it rests on "adequate and independent state grounds." *Id.* Petitioner appears to be arguing that if the Wisconsin Court of Appeals wrongly interpreted state law, it must somehow have based its decision on federal grounds. That plainly was not so. *See* Part I, above.[2]

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[2] The petitioner asserts that the Wisconsin Court of Appeals' conclusion that he had not proven an element of battery cannot provide "an adequate state law ground" because "Wisconsin law is clear, that acts need not be unlawful to be actionable for battery." Pet. at 24. However, the petitioner never argued to either the Wisconsin Court of Appeals or the Wisconsin Supreme Court that unlawful contact is not an element of battery.

Even if the petitioner had not waived this issue, moreover, his contention that unlawful contact is not an element of battery under Wisconsin law is simply wrong. The case he cites for that proposition, *McCluskey v. Steinhorst*, 173 N.W.2d 148 (Wis. 1970), did *not* hold that unlawful contact was not an element of battery. Rather, it held that a plaintiff need not prove unlawful *intent* as an separate element of common law battery, because unlawful intent is inferred as a matter of law from unlawful contact. *Id.* at 152.

As the Court of Appeals' decision explains, unlawful contact has long been an element of common law battery in Wisconsin. Pet. App. at 8a. The court's conclusion that the petitioner failed to prove an essential element of common law battery because there was no unlawful contact provides an independent, adequate and correct basis for rejecting the petitioner's common law claim.

Whether a Wisconsin court correctly interpreted its common law is not a concern of this Court, of course. The petitioner's arguments about the correctness of the Court of Appeals' interpretation of state law were properly addressed to the Wisconsin Supreme Court. That court already has determined that the petitioner's claim does not merit review.

The petitioner apparently believes that this Court's certiorari jurisdiction extends to reviewing state court decisions to determine whether they correctly applied state law. Citing *Ward v. Board of County Comm'rs,* 253 U.S. 17 (1920) and *Howlett v. Rose,* 496 U.S. 356 (1990), the petitioner argues that it is "the province of the United States Supreme Court to inquire whether non-federal grounds put forth in the state court opinion were without any fair or substantial support" and that "[t]he adequacy of a state law ground to support a judgment is itself a federal question." Pet. at 21-22. Neither case establishes such a broad rule.

In both *Ward* and *Howlett,* the state courts rejected on state law grounds claims asserting federal rights. In *Ward,* the Oklahoma Supreme Court rejected a claim by members of the Choctaw tribe that a county had illegally collected taxes on land that was exempt from such taxation by federal law. This Court held that it had jurisdiction to review the case because

> [*t*]*he right to the exemption was a federal right,* and was specifically set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the [Oklahoma] Supreme Court is a quesion as to which the claimants were entitled to invoke our judgment. . . .

253 U.S. at 22 (emphasis added).

This Court applied the identical reasoning in *Howlett,* where the Florida Court of Appeal held that a state

sovereign immunity defense was available in an action under 42 U.S.C. § 1983 brought in state court. In rejecting that immunity defense, this Court observed that it had "an independent obligation to ascertain whether a judgment *defeating the enforcement of federal rights* rests upon a valid nonfederal ground. . . ." 496 U.S. at 366 n.14 (emphasis added).

This case, in contrast, does not present a situation in which the Wisconsin courts have denied the enforcement of any federal right. The petitioner based his claim solely on the state common law of battery and the Wisconsin Court of Appeals rejected that claim based solely on state law.[3] Neither *Howlett, Ward,* nor any other decision of this Court give this Court jurisdiction to review a state court decision rejecting a state law claim to determine whether the court properly applied state law.

Nor is this a case in which a state court's decision was based on both federal and state law grounds and this Court must ascertain whether the asserted non-federal ground independently and adequately supports the judgment. *Cf. Michigan v. Long,* 463 U.S. 1032 (1983). The Wisconsin Court of Appeals' decision was based only on state law grounds. Regardless of whether the Wisconsin Court of Appeals correctly decided the state common law issues that were presented, this Court does not have jurisdiction to review this case.

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[3] In the Wisconsin Court of Appeals, petitioner emphasized that this was "a simple common law tort action alleging battery. No federal constitutional issue of the right of privacy upon which the abortion right is founded . . . is presented." Brief of Respondent, *Vandervelden v. Victoria,* No. 91-0982 (Wis. Ct. App.) at 10.

CONCLUSION

This Court has no jurisdiction to do what the petitioner asks. A state court decision based solely on state law grounds should not be reviewed by this Court to determine whether state law was applied correctly. Yet that, in effect, is what the petitioner seeks. Accordingly, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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